***THE HONOURABLE SRI JUSTICE N.R.L.NAGESWARA RAO**

+ SECOND APPEAL NOS.536 & 561 OF 1994

% 15-11-2012

Namakari Muni Reddy

….Appellant

Vs.

$ Ciddgunta Subrahmanyam

…. Respondent

! Counsel for the Appellant : Sri K.V.Subrahmanya Narsu

Counsel for the Respondent: Sri V.L.N.G.K.Murty

<Gist :

>Head Note:

? Cases referred:

1. (2008) 15 SCC 673
2. (2011) 1 SCC 167
3. 2003(4) ALD 389 (DB)
4. 2011(3) ALT 137

THE HON'BLE SRI JUSTICE N.R.L.NAGESWARA RAO

SECOND APPEAL NOS.536 & 561 OF 1994

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COMMON JUDGMENT:-

Both appeals arise out of the common judgment of the Senior Civil Judge, Srikalahasthi in A.S.Nos.26 and 24 of 1988. A.S.No.26 of 1988 arises out of the suit O.S.No.318 of 1981 and A.S.No.24 of 1988 arises out of the suit O.S.No.322 of 1983. Both the suits were tried together and evidence was recorded in O.S.No.322 of 1983. S.A.No.536 of 1994 arises out of the judgment in A.S.No.26 of 1988; whereas S.A.No.561 of 1994 arises out of the judgment in A.S.No.24 of 1988.

02. The appellant herein filed the suit for specific performance of the contract and the brief facts in both the suit are that one Ch.Nagamma, who is examined as PW.2, mother of the PW.1 and the mother of the defendants are sisters. The suit schedule property, which is said to be a vacant site, belonged to Nagamma(PW.2). The suit O.S.No.318 of 1981 was filed for specific performance of an agreement of sale dated 02-04-1981 for Rs.10,000/- alleging that PWs.1 and 2 agreed to sell the property for a consideration of Rs.10,000/- and a sum of Rs.9,500/- was paid. It was also specifically pleaded in the suit O.S.No.318 of 1981 that PW.2 executed a registered will in favour of PW.1 who is said to be residing with her, but subsequently for their need, the agreement of sale said to have been executed and though the appellant herein is ready and willing to perform the part of the contract, it was postponed and denied and consequently the suit for specific performance was instituted on 03-09-1981.

03. In the above suit PW.2, who was only the original defendant, filed written statement denying the genuineness of the contract of sale and

pleading that it was a fraudulent one and she did not receive any consideration and possession was also not delivered. According to her, she has executed a will and thereafter executed a registered settlement deed in favour of PW.1, which is Ex.A-1 dated 09-09-1981. Therefore, she pleaded for a dismissal of the suit for specific performance.

04. On the basis of the alleged settlement deed, PW.1 has filed the other suit O.S.No.322 of 1983 for declaration of title and injunction and PW.1 was also subsequently added as a party in O.S.No.318 of 1981.

05. The appellant herein who is the defendant in O.S.No.322 of 1983 filed a written statement reiterating the agreement of sale and also the right for specific performance and consequently challenging the gift deed.

06. As already stated above, after framing necessary issues, the trial court after recording the evidence on both sides decreed the suit for specific performance and dismissed the suit filed by PW.1. As against that Pw.1 preferred appeals and both appeals were heard together and after consideration of the material evidence on record, the learned Senior Civil Judge found that findings of the lower court are not proper and consequently set aside the judgment in both suits and decreed the suit O.S.No.322 of 1983 and dismissed the suit O.S.No.318 of 1981. As against that Second Appeals were preferred.

07. Earlier, a learned single judge of this Court by judgment dated 03-02-2006 allowed both the appeals. As against that the matter was carried to the Supreme Court and the Supreme Court in its judgment dated 17-09-2007 in Civil Appeal No.4312 of 2007 set aside the judgment and ordered for framing substantial questions of law and dispose of the appeals. After remand, the following substantial

questions of law were framed.

(1) Whether the plaintiff in O.S.No.322 of 1983 has acquired valid title to the property from Nagamma and the decree granted by the lower appellate court is legal and sustainable?

(2) Whether the plaintiff in O.S.No.318 of 1981 is entitled for the specific performance of the contract of sale executed by Nagamma and the plaintiff in O.S.No.322 of 1983 is not bound by the agreement of sale and the judgment passed by the court below is legal and sustainable?

08. The learned counsel for the appellant also wanted another substantial question of law with regard to the judgment of the lower appellate court and accordingly on the basis of the decisions relied on by him, the following additional substantial question of law is also framed.

Substantial question of law (No.3)

Whether the judgment of the lower appellate court is vitiated and is liable to be set aside for non-compliance of mandatory procedure of adverting to the reasons given by the trial court before reversing the judgment of the trial court?

POINTS:-

09. There is no dispute about the relationship between the parties and when this court considered the appeals earlier, it was found that subsequent to the institution of the suit Exs.B-12 and B-14 were executed in pursuance of the contract of sale and the will was also cancelled and, therefore, the relief prayed in O.S.No.318 of 1981 was achieved and consequently there is no relief and as there is no proof of the agreement being vitiated by fraud, the suit O.S.No.322 of 1983 is to be dismissed as the settlement deed Ex.A-1 is after the contract – Ex.B-1.

10. The learned counsel for the appellant contends that the lower court has not properly assessed the evidence with regard to the truthfulness of the agreement of sale and the PW.2 who is the owner of the property admitted in her evidence that Ex.B-1 was executed by her and consequently the burden is on the PW.1 or PW.2 to prove that it is vitiated by fraud and there is no material and consequently in view of the admission, the contract of sale has to be taken as true. He relied on the decisions reported in ***Ranganayakamma and another Vs. K.S.Prakash (dead) by Lrs and others***[1] and ***Alva Aluminium Limited, Bangkok Vs. Gabriel India Limited***[2]

11. On the other hand, it is the contention of the counsel for the respondent that mere admission of PW.1 is of no avail since she has specifically stated that the agreement was obtained stealthily and by playing fraud and, therefore, the admission if taken totally is not an admission of the agreement Ex.B-1, entitling specific performance of the contract of sale. He relied on the decision reported in ***Ruttala Simhachalam Vs. Chundru Bhimeswara Jagannadham and others***[3] where under the burden of proof with regard to illiterate woman in payment of consideration etc., were considered and found that the burden is on the person who claims payment of the same. He also relied on the decision of this court reported in ***Chodi Mahalakshmi Vs. Koppada Sathiraju and another***[4] where under it was held that mere admission of the signature is not sufficient.

12. Evidently, as can be seen from the proceedings in these two suits, it is quite clear that PW.2 seems to be of weak mind and she is aged and illiterate. In fact, the appellant herein did not doubt or dispute the execution of the registered will, Ex.A-8 dated 27-11-1980, in favour

of Pw.1 as being a document procured by undue influence or playing fraud by PW.1 on PW.2. In fact, it is the specific allegation in the plaint that PW.1 and 2 offered to sell the property to the appellant herein. If that is so, there is no reason as to why PW.1 was also not asked to be associated with the agreement Ex.B-1 since the appellant is aware of the alleged will Ex.A-8. In fact, PW.1 was also not associated as an attester on the said agreement-Ex.B-1. Therefore, if the transaction has taken place with the knowledge of PW.1, who was holding a registered will, naturally, any prudent man would have asked him to attest the agreement. There is no such conduct pleaded or proved on behalf of the appellant. Therefore, when once the presence of PW.1 and his knowledge of execution of the agreement Ex.B-1 is improbable, then the very theory of the appellant that the property was agreed to be sold by PW.1 and 2 is patently a falsehood.

13. Evidently, in case of a fraud, it is only circumstances that have to be taken into consideration while considering the genuineness of a document. From the conduct available on record, the appellant has been making frantic efforts to get the suit schedule property in which PW.2 intended to create rights. It is to be noted that PW.1 was examined on 01-03-1988. Prior to the examination of this witness, Ex.B-12 dated 14-10-1986, which is said to be a document cancelling the will-Ex.A-8, was said to have been executed. So also Ex.B-14 dated 31-10-1986 was said to have been executed by PW.2 in pursuance of the agreement of sale Ex.B-1. After this, I.A.No.670 of 1988 was filed by the appellant herein for amendment of the plaint seeking for deletion of the prayer of specific performance and for declaration that the plaintiff is the absolutely owner of the property. In that application, a counter was filed denying the execution of the sale deed and the Junior Civil Judge has dismissed the said application holding that it changes the nature of the suit and that order has

become final. Not only that the learned Junior Civil Judge in his judgment specifically found in para.27 that nobody connected with Exs.B-12 to 14 were examined and made an effort to compare the thumb impression, but, however, restrained himself and ultimately found in para.28, as follows:

> "In the light of my above discussions, I have no hesitation to hold that Chapala Nagamma had executed Ex.B-1 and as Ex.B-14 could not be proved, the only solution and result that follows is to order for the specific performance of Ex.B-1."

In fact, this is a strange situation. The relief of specific performance which was claimed and become infructurous after the alleged Ex.B-14 and Ex.B-14 is held to be not proved as executed by PW.2 by the court below. As against these findings, the appellant has not preferred any appeal. In fact, when PW.2 was in the box and when she was cross-examined at length, the execution of Exs.B-12 to B-14 by her were not at all elicited nor she was confronted with the alleged documents. If the appellant is behaving openly and acting prudently, there is no reason as to why these documents should not be confronted with PW.2 if they are really genuine. There is nothing on record to show from her cross examination that under the influence of PW.1, she has resiled from Exs.B-1 and 12 to 14 at the time of giving the evidence. Therefore, when the relief of amendment of declaration of title is dismissed and has become final and when the sale deed which is said to have been executed in pursuance of the contract of sale is found to be not executed by PW.2 as it was not proved so, then the relief under the agreement Ex.A-1 does not survive for any further consideration as it has to be held that the appellant has accomplished the relief of specific performance having claimed that a regular sale deed was executed. It is undisputable when the contract has been enforced by a regular sale deed the contract does not survive for consideration and when once the sale deed is not proved, the question of granting further relief of

specific performance on the basis of a contract, which was already alleged to have been enforced, does not arise. Consequently, the relief granted by the learned Junior Civil Judge is not in accordance with law. If the transactions are *bona fide* and when PW.2 was in the box, it could not be proved that she voluntarily executed Exs.B-12 to B-14, they can only be taken as fabricated documents and consequently an inference has also to be drawn that Ex.B-1 is also a document of fraud exercised on PW.2, as claimed by her. No evidence more than this is required which includes the positive assertion of an illiterate woman and the questionable conduct of the appellant even subsequent to Ex.B-1. In fact, the lower appellate court has given sufficient reasons to discard the evidence of the scribe and attester on Ex.B-1 and when such evidence is discarded, mere admission of the signature or thumb mark of PW.2 on Ex.B-1 cannot establish that it was a true and genuine document.

14. Therefore, for all the above reasons, I have no hesitation in holding that Ex.B-1 is not proved to be a genuine and the findings of the lower appellate court on this aspect cannot be faulted and the lower appellate court has done right assessment of the evidence. In fact, the lower appellate court has framed the points for consideration touching on Ex.B-1 sale agreement and its validity since it is only a question that survives for consideration and it cannot be said that there is any deficiency on the part of the first appellate court. However, the first appellate court also has considered all the issues. It is needless to say that if Ex.B-1 is not true, then it cannot defeat the gift deed and Ex.A-8 will and the appellant will not be getting any rights. Even if the gift deed is only for part of the property, still the registered will-Ex.A-8 confers all the rights on the PW.1 and consequently the decree in O.S.No.322 of 1983 cannot be faulted.

15. Therefore, I find no compelling reasons to interfere with the

judgment of the first appellate court and all the questions of law, as substantial questions of law as framed, held against the appellant and accordingly both appeals are liable to be dismissed.

Accordingly, both Second Appeals are dismissed. No costs.

N.R.L. *NĀGESWARA RĀO*,J

15-11-2012
Note:-
LR COPY TO BE MARKED: YES
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[1] (2008) 15 SCC 673
[2] (2011) 1 SCC 167
[3] 2003(4) ALD 389 (DB)
[4] 2011(3) ALT 137